THE NAVAL WAR CODE.

THE code of "Instructions for the government of the armies of the United States in the field," drawn up by Professor Lieber and issued as General Order 100, in 1863, in some sense marked an epoch in the history of the rules of land warfare. It was a set of rules, humane and enlightened for the times, covering the ground broadly, expressed clearly and in codified form, while the rules of other powers lacked this definiteness and depended too much upon the impulse of the commander. Upon this code as a basis, it is not too much to say that all subsequent codes have been built up, whether official or unofficial, adopted or rejected, the work of a single writer, of a commission of publicists or of a conference of the powers.

Last June there was issued by the Navy Department of the United States a code of the "Laws and Usages of War at Sea," prescribed for the guidance of the naval service by General Order 551, which is comparable in all particulars with the land code of thirty-seven years ago. Drawn up by Captain C. H. Stockton, it, too, is enlightened and specific, and like Lieber's Code, in scope and comprehensiveness is the first in the field. May it not likewise serve as a model and foundation for other codes of other powers, and thus help in the great work of unifying the laws of war?

Although Captain Stockton's Code is too long to be printed and discussed in full in the pages of this REVIEW, I have hoped that its readers might be interested in some of its more noticeable and debatable features, with occasional comparison with the rules of other navies. No authoritative statement of the latter, covering the same field, is to be had, however. Information as to their rules must be gathered from instructions for special occasions, from regulations as to particular service, from the manuals of text

writers not in codified form nor officially adopted, and from the formal works of the publicists.[1]

SECTION I.

Article 1.—The code begins with a novel and interesting statement of the special objects of maritime war. These are:

"The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property and sea-borne commerce."

Two facts are here clearly shown. One is that, whatever the policy of the State Department may be, looking towards the exemption of an enemy's innocent property on sea from capture (which was the Marcy idea in 1856), the navy clings to the unquestionable right to prey upon an enemy's commerce. This has been our own usage from the birth of the Republic, except as surrendered by treaty with Italy in 1871. It is the usage of other maritime powers. Protection from similar attack on the part of an enemy is part of the duty of the United States Navy. All this is in accordance with the ancient rule, consistently adhered to down to the present time. Clearly if this rule is to be abrogated in the interest of innocent commerce, the movement must be initiated by some body other than a naval department. Even the International Law Associations are not ready to recommend so sweeping a change.

The other "special object" to which attention is called is the prevention of an enemy from procuring war material from neutral sources. This is a plain admission of a principle perfectly well understood, that the suppression of contraband trade rests on the shoulders of the belligerent who would be injured, and not on the neutral government. The

[1] For purposes of comparison with earlier rules of naval warfare, the writer has been obliged to content himself with Snow's Manual for the U. S. A., Lushington's Naval Prize Law for Great Britain, the Instructions to the French Navy at the Outset of the War of 1870, printed in Snow's Cases, and with the treatises upon International Law, of various nationalities.

recent inquiry in Congress into the sale of horses and mules to the British Government for use in South Africa, shows that this admission is not so unnecessary as might be thought.

Article 2 describes the area of maritime warfare, which comprises all waters not neutral. This made it essential to define the extent of coast sea over which the neutral has jurisdiction.

"The territorial waters of a state extend seaward to the distance of a marine league from the low-water mark of its coast line."

This is one more proof of the wide-spread recognition of three miles as the extent of a state's coast sea. Lushington gives the British rule thus: "The territorial waters of a state are the waters within three miles of any part of her territory." But the instructions for the French Navy prescribe the other rule: "*Vous considérerez les eaux territoriales comme c'etendant à une portée de canon au-delà de la laisse de basse mer.*" And the Germans incline to the same theory. The difficulty with a cannon-shot distance to measure the width of coast sea, instead of an arbitrary three-mile zone, is that it is not exact. It would vary with every gun, with every new invention, with every year. Some conventional distance is necessary, therefore; it matters little what. But as three miles are specific, and more widely accepted than any other measurement, it is well that our code should cling to them as the proper limit of a State's jurisdiction.

In Articles 3 and 4 attention is directed to the following rule, expressed first in general terms, and afterwards more specifically:

"Non-combatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such non-combatants will permit."

"The bombardment by a naval force of unfortified and undefended towns, villages or buildings is forbidden, except where such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential at the time to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given. The

bombardment of unfortified and undefended towns and places for the non-payment of ransom is forbidden."

The rules of the Hague Conference governing land warfare forbid the bombardment of undefended places unequivocally. The rules of the Navy Department here quoted permit it where supplies are forcibly withheld, that is as a penalty for failure to furnish a ship of war with what it wants, coal, for instance. This would seem to be new ground. Neither do the rules of other navies, nor the text writers take up this exact question. The prohibition of bombardment for non-payment of ransom shows the intention of the code to be humane. Under these circumstances it may be questioned whether the exception noted is justifiable. Would not the proper procedure be to send a landing party to requisition needed supplies? Then if resistance is made and "supplies *forcibly* withheld," the town is not "undefended"; it may be seized and the ship's needs satisfied. But bombardment is so undiscriminating, so destructive a method, as to be out of all proportion to the nature of the offense which it is designed to punish. It is just this readiness to destroy innocent property in order to exert pressure that has prejudiced the minds of many against naval methods. The practice of destruction is neither a proper substitute for a landing party and taking possession in war, nor for diplomatic settlement in peace. The language of the code is also too indefinite. It specifies "*reasonable* requisitions" for "*essential* supplies," both conditions to be judged of by the ship's chief officer. The sentiment of to-day would surely agree with Lawrence[1] in the wish that "open and undefended places should not be bombarded at all." The usage of to-day has not declared itself in the matter under discussion. The analogy of land warfare and the code's own prohibition of bombardment to collect contributions both seem opposed to it. We conclude, therefore, that this rule is to be regretted as one of the few points in the code open to criticism.

The next topic of the code treats of submarine cables in war. It will be remembered that in the international

[1] Page 443.

treaty of 1884 for the protection of submarine cables, Article XV, it is expressly laid down that "the stipulations of this Convention shall in no wise affect the liberty of action of belligerents," and the United States Navy in the Spanish war cut them freely. What the aforesaid "liberty of action" means, the code undertakes to lay down. It divides (Art. 5) submarine cables into three classes: Those between enemy's points or between the United States and hostile territory; between neutral territory and an enemy; between neutral points. The first, irrespective of ownership, are "subject to such treatment as the necessities of war may require." The second "may be interrupted within the territorial jurisdiction of the enemy." The third shall be inviolable. This is all reasonable and good. Of course it was not the province of the Navy Department to speak of damages for cutting cables, nor is the belligerent's liability clear. The damage is two-fold, from destruction of plant and from interruption of traffic. The first is usually a mere break and easily repaired. The second can in many cases be lessened by military control and a censorship. Liability for damage resulting from these causes has not been discussed by text writers, nor determined in the courts or by negotiation as yet, so far as I am aware. If the analogy of land telegraph wires and railway lines, leading from neutral to enemy's territory, were followed, it would seem that the rules should forbid wanton destruction, permit military use, admit liability for damage, to be settled after the war, and require restitution of neutral plant as soon as necessity permitted.[1] But the analogy is not a perfect one, and the feasibility of continued commercial use under military censorship tends to make complete stoppage of business less excusable.

Somewhat similar is the neutral's right to indemnity in case of seizure of his vessels on the ground of military necessity, which the next article (6) rules upon:

"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military pur-

[1] Hague Convention, Art. 53 and 54: "et les indemnités seront réglées à la paix."

poses, but in such cases the owners of neutral vessels must be fully recompensed."

This is the *jus angariæ*. An illustration would be the seizure and sinking in the Seine of six English vessels in 1870 by the Germans to bar the ascent of the river by French gunboats. The Germans excused their act on the ground of pressing military necessity, and paid for the property destroyed. They are said, however, to have suggested that since it was the menace of French gunboats which necessitated the deed, the claim for damages should properly lie against France rather than Germany.

Article 7:

"The use of false colors in war is forbidden, and when summoning a vessel to lie to, or before firing a gun in action, the national colors should be displayed by vessels of the United States."

Just what is and what is not good form in the deception of one's enemy it is puzzling for the civilian to guess. In land warfare you may not make improper use of the enemy's flag or uniform, but you "may employ ruses of war, and circulate false information"[1] So Lushington[2] says:

"A commander may chase, but under no circumstances may fire, under false colors."

Ortolan, himself a French naval officer, permits false colors until the fight opens. Calvo allows them for escape, but never for attack. Thus the rule of the code is an advance upon the usage of other States; it is also an improvement upon our own earlier usage, which, as stated in Snow's Manual for the use of the United States Navy (page 92), permitted the use of a foreign flag to deceive an enemy but hauled it down before a gun was fired.

SECTION II.—BELLIGERENTS.

The section entitled "Belligerents" defines lawful combatants on sea, the Naval Militia and Reserve, for instance, distinguishes non-combatants and prescribes the treatment of both. Attention is directed to but one article here, No. 11:

[1] Hague Conv., 23, 24.

[2] Rule 17.

"The *personnel* of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses or as prisoners of war, when, by training or enrolment, they are immediately available for the naval service of the enemy, or they may be released from detention or confinement."

Here the question is whether individuals in the crew of an enemy merchantman can be properly held as prisoners, as the code permits. The present usage of naval warfare undoubtedly allows this, and does not condition it, as the code does. But it may be questioned whether this is not a severity which reason and humanity unite in discouraging. The reason given in justification of the present rule is that certain seamen are fit "for immediate use on ships of war"[1] So, if a hostile army invaded France or Germany, would every peasant be fit for immediate use in war because he had once served under the colors? It would seem that the distinction between combatants and non-combatants should be one of fact, not one of a possible intention. Here are enemy's subjects engaged in an innocent occupation, having no relation to war. There is no proof of a wish to serve on a warship. Service on the merchantman is evidence to the contrary. The sending of their ship to a hostile port for adjudication further removes the crew from likelihood of service. Why should imprisonment be added to the hardship of capture and loss of wages and the suffering of those dependent? This is not finding fault with our Naval Code—that follows usage. We merely suggest this as a desirable innovation—humane, rational and by no means dangerous.

SECTION III.—BELLIGERENT AND NEUTRAL VESSELS.

Section III, on Belligerent and Neutral Vessels, reflects the best modern usage. It exempts from capture "coast fishing vessels innocently employed," following the decision of the Supreme Court in the case of the Spanish smacks *Paquete Habana* and *Lola*[2] rendered in January, 1900.

It allows the destruction of an enemy's merchantmen in case of necessity. Such excuse for scuttling or burning a

[1] Hall, 2d Ed., p. 369.

[2] 175 U. S. 677.

ship instead of sending in for trial would be inability to spare a prize crew, unseaworthiness, want of an open port. But in such case a survey and inventory must be taken and lodged with the Prize Court.

Article 15 allows free passage to the merchant vessels of an enemy sailing from a United States port prior to the declaration of war, unless engaged in guilty traffic. The same in port are given thirty days to load and sail. And enemy's ships bound for our ports before the outbreak of war may enter, discharge cargo and proceed to any port not blockaded. President McKinley's proclamation of April 26, 1898, exemplified this usage.

The violation of neutrality involved in an increase of armament or crew in a neutral port is forbidden.

The neutral flag covers enemy's goods, showing that, although not a party to the Declaration of Paris of 1856, and not entitled to its benefits, the United States yet is bound by its rules.

The final rule in this section recalls the later usage of the Civil War. Neutral mail steamers bearing hostile despatches as the ordinary business of a mail carrier

"are not liable to seizure and should not be detained, except upon clear ground of suspicion of a violation of the laws of war with respect to contraband, blockade or unneutral service, in which case the mail bags must be forwarded with seals unbroken."

SECTION IV.

We come next in Section IV to the regulations affecting hospital ships. It will be remembered that the rules of 1868, to extend the Geneva Convention to naval war, were not ratified by the signatories. This matter was taken up at the Hague in 1899 and a convention agreed upon, which the United States Senate ratified on May 4, 1900. The rules thus adopted are, therefore, binding upon the navy, and we should expect to have them incorporated into its code. In great part they have been, and presumably would have been in whole, but for the fact that the code, issued June 27, 1900, must have been in press when the convention was ratified. The omission relates to the authorization

of neutral hospital ships. At the conference the status of men picked up by these was called in question. Were they to escape under the protection of the neutral flag, as so many of the crew of the *Alabama* did, picked up by the English yacht *Deerhound* off Cherbourg? Or should they be handed over to the victor or set ashore on parole? This was Captain Mahan's main stumbling block in committee, and this prevented his signing the Convention with the rest. He had urged that no neutral hospital ships should be licensed, that all such offering aid should bear the flag of and be subject to one belligerent or the other. The code bears the stamp of his objections. It exempts from capture public and private ships of either combatant, licensed and fitted for hospital service. They shall give relief without regard to nationality, must take their chances in an engagement, are under orders to the fleet with which they unite and must be clearly marked white with a red strake. Then a third class of vessels is authorized to do similar work—merchantmen, yachts or neutral vessels near by. These may gather up the wounded, but shall then report "to the belligerent commander controlling the waters thereabouts," and cannot carry off the rescued men without permission. All rescued sick and wounded are thus to be considered prisoners of war, and may be sent to their own, to a neutral or to the enemy's country as the controlling power wills, with the condition of no further service in that war.

These three classes of licensed vessels are copied from the Hague Convention. The additional class which that includes, but which the code omits, consists of hospital ships "equipped in whole or in part at the expense of neutral individuals, or of societies officially known." These are to be respected and exempted from capture, if the neutral power to which they belong has commissioned them, and given their names to the belligerents.

Whether the American objection to this provision is justified or not, the provision itself is apparently now obligatory. And certainly, compared with the value of the whole, the defect in this clause is trifling. For the general adoption of the Geneva rules for use on sea is a step towards the general adoption of a naval war code. And with a set of rules to govern war, both on land and sea, we

shall have advanced a long ways towards that most desirable goal, the unification of the rules of International Law.

SECTION V.—THE EXERCISE OF THE RIGHT OF SEARCH.

This is confined to properly commissioned vessels of war, and neutral convoys are exempt from it,

"under escort of vessels of war of their own State * * * upon proper assurances, based on thorough examination, from the commander of the convoy."

Here, for the first time, the United States and Great Britain part company in their practice concerning this matter. Both have stood out in their prize law against the continental doctrine that ships under neutral convoy are exempt from search without a treaty provision to that effect. Thus, in 1870, the instructions to the French navy were as follows: "*Vous ne visiterez point les bâtiments qui se trouveront sous le convoi d'un navire de guerre neutre*," but in case of suspicion that the convoying officer has been deceived, he shall make search alone; while Lushington says: [1]

"Vessels under neutral convoy are not on that ground exempt from visit, search and detention."

The United States had in 1887 ten treaties granting the right of convoy, that with Italy of 1871, and the rest with American States; and the political branch of our Government has long inclined to concede and to claim the right of convoy. These are the influences which are reflected in the code provision. But it may well be doubted whether as a concession to the neutral it is really valuable. Hall ends his discussion of the topic as follows: [2]

"It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals. It is fortunate, in view of the collision of opinion which exists

[1] Sec. 280.

[2] Page 681.

on the subject, that there is every reason to expect that the use of convoys will be greatly restricted in the future by the practical impossibility of uniting in a common body vessels of very different rates of speed, superior speed having become an important factor in commercial success."

This section also lays down with much particularity the way in which a search shall be conducted, following good usage and the provisions of many of our treaties, to avoid unduly arousing the susceptibilities and encroaching upon the powers of that sovereign individual, the merchant skipper.

SECTION VI.—CONTRABAND OF WAR.

This section well illustrates the clear and simple arrangement of the code. Contraband goods are of two sorts, those ordinarily used for warlike purposes; those, *ancipitis usûs*, which when destined for specific military use, are also contraband. Apart from the treaty lists, which are so common, the code declares that articles conditionally and unconditionally contraband will be duly and publicly announced at the outset of a war. Then follows a list of articles absolutely contraband, which illustrates modern inventiveness, and this smaller list of conditionally contraband:

"Coal when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs; and money when such materials or money are destined for the enemy's forces; provisions when actually destined for the enemy's military or naval forces."

That coal, money and provisions may, under certain circumstances, be contraband, is the law as British and American writers, courts and naval officers understand it. But France and Russia deny any occasional contraband character to coal. The phrase, "actually destined for the enemy's military or naval use," is very similar to the language of the Supreme Court in the Commercen[1] which declared provisions contraband when "destined for the army or navy of the enemy, or for his ports of naval

[1] 1 Wheat. 382.

or military equipment." A mere hostile destination, then, is not enough to give provisions a contraband character, and several writers of repute, Wheaton and Hall, for instance, think that they should be bound for a place actually invested or blockaded, which was the contention of the United States Government in 1793, when England seized American provisions destined for all French ports. This is also the continental doctrine. Great Britain objected in 1885 when France, in conflict with China, made rice, bound for open Chinese ports, contraband. And the United States again protested, when provisions for the Portuguese port of Lorenzo Marques, but probably destined for Boer consumption, were seized by British cruisers; and the practice was stopped. Thus our code follows the decisions of the British and American courts, while all governments try to secure the widest commercial liberty possible for their citizens.

SECTION VII.—BLOCKADE.

The laws of blockade in general do not involve much that is disputable, and the code treatment of this important topic is adequate and good. Thirty days are allowed for neutral ships to load and leave a blockaded port. If intent to break blockade can be shown, liability to capture attaches from the very outset of the voyage. The crews of blockade runners are not lawfully prisoners, but certain of them may be detained as witnesses before the Prize Court. These three rules all recall our own usage as worked out in the Civil War.

The final section, IX, allows the naval commander to conclude a truce or capitulation with the enemy, limited strictly to his own force. With the nearest cable cut, and his departmental head some thousands of miles away, he needs wide powers and can be trusted with them. On the other hand, a general armistice is solely a governmental act.

"Acts of war, done after the receipt of the official notice of the conclusion of a treaty of peace or of an armistice, are null and void."

It might have been added that acts of war, done after the conclusion of a truce or peace, but before the news of

it had reached the distant combatants, must be undone or compensated for as far as possible. It will be remembered that the fall of Manila took place after the signature of the protocol, which served as a basis for the treaty of peace with Spain, but before news of it reached the Philippines. On this ground, at Paris, the legality of the capture of Manila was contested. But as the protocol itself surrendered the city subject to future disposal, the question was not a vital one.

A few general remarks may properly bring this commentary to an end.

The Admiralty Courts of the United States have naturally followed British rather than foreign decisions in prize cases. On the other hand, the national policy, being that of a State usually peaceful and neutral, has in many respects adhered to continental doctrine. These two tendencies have caused an occasional want of harmony between two branches of the Government, both of which are influential in the shaping of our rules of naval capture. This code accordingly reflects both, but subject, nevertheless, as its final article (55) declares, "to all laws and treaties of the United States that are now in force, or may hereafter be established."

And so one detects in it now a bit of navy prejudice, now a bit of government policy, and now the influence of a Supreme Court decision. But including all, above all, it purports to be the accepted rules of the International Law of to-day. As such it is to be judged, academically now, practically in future war. And my judgment is altogether favorable. As a compilation and interpretation of the law for the guidance of the navy, it is modern, clear, enlightened and rational, a credit to the department which issues it, and to the gentleman whose name it bears.

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